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No. 99-2028

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JANE DOE, A MINOR, BY HER PARENTS AND NEXT FRIENDS, JOHN DOE AND JUNE DOE, PARENTS,
Petitioners,

v.

ARLINGTON COUNTY SCHOOL BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

This case presents the fundamental question of the proper role of the federal and state courts in exercising their statutory duty pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*, ("IDEA") to receive the records of the administrative proceedings, to hear "additional evidence" at the request of the parties, and based upon a preponderance of the evidence, grant such relief as the court determines is appropriate. 20 U.S.C. § 1415(e)(2). Respondent Arlington County School Board ("the School Board") attempts to confuse the issues raised in the Petition for Writ of Certiorari by setting forth arguments based on conjecture, an inaccurate rendition of the factual record, fallacious reasoning, and erroneous legal principles. The School Board's Brief in Opposition fails to controvert with any persuasive authority arguments made by Petitioners why this Court should grant Certiorari and concedes there are genuine splits among the views of the Circuits and the Supreme Court of New Jersey.

The School Board relies heavily on the buzz words "due weight" and "deference to the administrative decisions," but never advances any statutory or policy reason for according judicial deference to any of the decisions made by the Hearing Officer or the Reviewing Officer who lacked any substantive expertise in education.[1] *See* Petition for Certiorari at 11. The School Board also fails to recognize that courts below incorporated the legal errors made at the administrative level and neither court ever considered Petitioners' evidence and arguments on the merits. Petitioners are entitled to an evaluation of the evidence and fact finding under correct legal standards. *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

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[1] Deference to the decisions of the Hearing Officers would be appropriate only if they had expertise in the area of education. *See Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

I. BURDEN OF PROOF ON MAINSTREAMING

The School Board seeks to obfuscate the burden of proof issues raised in the Petition for *Certiorari*. There are two distinct burden of proof issues before this Court and there are separate splits in the Circuits over the allocation of the burden of proof at the administrative level and in the District Court. The approach taken by the Fourth Circuit effectively denies the parents any meaningful opportunity for administrative or judicial review of the School Board's refusal to mainstream Jane Doe because the parents have the burden of proof at both the administrative and judicial levels. School systems nationwide routinely mainstream children with far more severe handicaps, such as Down's Syndrome, while the Fourth Circuit allows the Arlington County School Board to segregate its special education students away from general education classrooms under the rubric of excessive deference to the school system and by placing the burden of proof on the parents throughout the administrative and judicial review processes. As a result of the erroneous decision below, the School Board is allowed to ignore the requirements of the IDEA that the removal of handicapped children from the regular classroom may occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

A. Petitioners Raised the Burden of Proof Below

The School Board misleads this Court by claiming that Petitioners failed to raise the issue below as to which party bears the burden of proof. This is simply not true. During the administrative proceedings, Petitioners' attorney raised this issue by arguing the well established legal principles outlined in *Oberti v. Board of Educ.*, 995 F.2d 1204, 1218-1220 (3d Cir. 1993) should apply. JA 686, 703. In his decision, the Hearing Officer cites *Oberti* but rejects the legal principle that the school should bear the burden of proving compliance with the mainstreaming requirement at the administrative level. JA

requirement at the administrative level. JA 1038. The Hearing Officer ruled that the parents had the burden to prove that the child's placement proposed by the School Board was *not* the correct placement. *Id.* This is contrary to the approaches taken by Second, Third, Eighth and Ninth Circuits. *See* Petition for Certiorari at 18. The School Board never addresses this split in the Circuits.

Petitioners vigorously argued the precise issue of burdens of proof before the District Court as well. When the School Board moved for summary judgment in the District Court, Petitioners argued that *Oberti* provided the correct rule of law and the burden of proof should properly be placed on the School Board, and not the parents.[2] J.A. 686, 703. Accordingly, the School Board's reliance on *Montana Dep't. of Revenue v. Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994), *Federal Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983), and *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) is totally misplaced. Since Petitioners raised the burden of proof issue at the administrative level and in District Court, this issue was properly before the Court of Appeals and properly preserved for review by this Court.

B. Decisions Below Turn on the Allocation of the Burden of Proof

More shocking is the School Board's brazen claim that this Court should not grant certiorari to review the issue of which party bears the burden of proof because it made no difference to the Hearing Officer, the Reviewing Officer, or the District Court in granting their decisions and that the burden of proof is merely

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[2] The School Board's argument that the initial Complaint failed to include any allegations regarding the burden of proof is puzzling because parties are not required by Fed.R.Civ.P. 9 to plead burdens of proof. Fed.R.Civ.P. 8(a) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."

a collateral issue that warrants no review by this Court. Brief in Opposition at 11.

The Respondent's argument that the administrative and District Court decisions were made simply based upon a straightforward weighing of all the evidence, independent of the assignment of any burden, is inconsistent with the record below. As the Respondent concedes, both the Hearing Officer and the District Court raised the issue of which party bears the burden of proof at the onset of their deliberations. Brief in Opposition at 11. They both concluded erroneously that the burden was on the parents, and considered this reasoning in reaching their final decisions. To continue to argue that neither of the opinions indicate that the decisions in any way depended upon assignment of that burden is inconsistent with the record below.

To reduce such a fundamental principle of the law, as the allocation of the burden of proof, to a mere collateral issue turns the judicial process upside down on its head. *Who* bears the burden of proof is an essential component that must be considered by any trier of fact in weighing the evidence.

The School Board cites *Bristow v. Drake Street, Inc.*, 41 F.3d 345, 353 (7th Cir. 1994), for the proposition that error in the assignment of the burden in this case does not justify reversal. The portion of *Bristow* cited by the School Board is included in Circuit Judge Posner's conclusion that the District Court did not err in failing to place the burden of persuasion on the employer pursuant to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), because doing so would not have affected the outcome. *Id.* at 353. Here, the evidence as to the appropriateness of the school system's program was not so persuasive that the Hearing Officer and the District Court could come to the same conclusion irrespective of which party carried the burden of proof. Moreover, the courts below clearly believed the placement of the burden of proof was important in determining whether the education plan proposed for Jane Doe by the School Board was appropriate.

C. The School Board is Wrong on the Merits

The School Board readily admits a split in the Circuits on issues relating to the burden of proof, but seeks to defend the rules of the Fourth Circuit. Brief in Opposition at 3. Respondent argues that the administrative Hearing Officer and the District Court correctly allocated the burden of proof to the parents to show that the School Board's refusal to mainstream Petitioner Jane Doe was erroneous. Although Respondent cites numerous Fourth Circuit cases supporting its position, the School Board fails to address the reasoning by the Third Circuit in *Oberti v. Bd. of Education*, 995 F. 2d at 1218-1220. Rather than engaging in any legal analysis, the School Board baldly claims the rule established by the Third Circuit in *Oberti* is inconsistent with *Board of Education v. Rowley*, 458 U.S. 176 (1982) because "[t]o impose the burden of proof on any party other than the party challenging the administrative decision would fail to give the administrative decision the "due weight" to which it is entitled. Brief in Opposition 14-15."

This reasoning is fallacious. The language and reasoning of the *Rowley* Court actually support the proposition that the burden of proof should be placed on the school, not the parents, even in challenging the administrative decision. The *Rowley* Court acknowledged that courts lack the "specialized knowledge and experience" necessary to resolve issues regarding educational policy. *Id.* at 208. It is only logical that the burden of proof be placed on the party with the most resources, the specialized knowledge, and who is in the best position to prove that the educational placement for the child is appropriate and that the child should not be mainstreamed with her peers. *Oberti, supra*, 995 F.2d at 1219; *Lascari v. Board of Educ. of Ramapo Indian Hills Regional High Sch. Dist.*, 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989).

The School Board confuses the issue of "due weight" with the allocation of the burden of proof. "The District Court can give

"due weight" to the agency proceedings (*i.e.*, refrain from imposing its own notions of educational policy on the states), while the ultimate burden of proof remains on the school." *Oberti, supra*, 885 F.2d at 1219.

In view of the IDEA's strong presumption of mainstreaming, it is even more appropriate that the School Board bears the burden of proving why a child should not be mainstreamed. Indeed, requiring Petitioners to prove at the District Court level that the School Board failed to comply with the IDEA would undermine the IDEA's express purpose in ensuring that the rights of disabled children and their parents are protected. Placing the burden of proof on the parents at both the administrative and judicial levels effectively nullifies the presumption in favor of mainstreaming that is integral to the IDEA and denies meaningful judicial review to parents who object to the refusal of their School Board to mainstream. *Id.* at 1218-1219.

The School Board now claims that "the decisions of these tribunals were made based upon a straightforward weighing of all the evidence, independent of the assignment of any burden." Brief in Opposition at 3. Yet, as the Respondent concedes, both the Hearing Officer and the District Court specifically addressed the burden of proof issue. *Id.* at 3, 11. Further, as we show below, if the Court had not relied on legally erroneous decisions, had properly placed the burden of proof of showing cause why Jane Doe should not be mainstreamed on the School Board, and had considered Petitioners' evidence on the merits, the courts would have reached a different decision in this case.

The facts of this case do not present a situation in which the burden of persuasion had to act as a "tie-breaker." Since the Hearing and Review Officers recognized that under the governing case law of the Fourth Circuit the burden of proof was on the parents, they simply wrote their decisions by rewriting the briefs submitted by the School Board. Similarly, the District Court and the Fourth Circuit adopted the School Board's view

of the evidence without considering the merits of the arguments raised by the parents. Petitioners are entitled to fact-finding on the merits of their claim which is untainted by legal error. *Pullman-Standard v. Swint, supra,* 456 U.S. at 292.

II. PETITIONERS HAD A RIGHT TO SUBMIT "ADDITIONAL EVIDENCE"

Respondent tries to convince this Court that there is no confusion among the Circuits as to the appropriate standard for the admission of additional evidence, but fails to address the fact that Petitioners have a fundamental right to present "additional evidence" at the judicial review level pursuant to the plain language of 20 U.S.C. § 1415 (e)(2). The School Board's argument that the District Court did not abuse its discretion in denying the admission of *any* additional evidence is contrary to law and the reasoned opinions of many Circuits. *Id.*

In denying the admissibility of relevant evidence, the District Court imposed a blanket *per se* rule denying the Petitioners' statutory right to introduce any relevant evidence that could not be introduced during the administrative hearings, thereby nullifying § 1415(e)(2). The District Court failed to engage in an informed case-by-case analysis regarding the admissibility of evidence. Dr. Jerome Bruns, Petitioners' expert witness, who spent 25 years as the Director of Student Services of Falls Church City Virginia Public Schools, was certainly "unavailable" to testify at the administrative hearings because he was implementing the mainstreaming requirements of the IDEA in Falls Church, Virginia. If any of the courts below had considered Dr. Bruns' opinion on the merits, J.A. 2074, that court would not have affirmed the administrative decisions.[3]

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[3] The District Court never addressed the argument raised by the School Board that the testimony of Dr. Bruns was not "sufficiently reliable" to be admissible. *See* Brief in Opposition at 19. In view of Dr. Bruns' extensive

The District Court also erred in refusing to admit the smoking gun memoranda written by the School Board's officials. To claim that these memos were "simply general expressions of personal opinion" is ludicrous. Brief in Opposition at 3. These memos were written by the Superintendent of Arlington Public Schools on official letterhead and reflected the policies and practices of the School Board. *See* Petition 27a - 31a. These official policy papers were compelling enough to persuade the Superintendent to take immediate action by not only calling upon all personnel to examine and consider the systemic violations of the IDEA, but to set into action a corrective plan.[4] *See* Petition 28a-31a.

The School Board, relying on *Walker County Sch. Dist v. Bennett*, 203 F.3d 1293, (11th Cir. 2000) asserts there is no genuine split in the Circuits because the "difference between the First and Sixth Circuits would seem to be more semantical than substantive." *Id.* at 1299. This analysis is misplaced for several reasons.

First, as the Sixth Circuit noted, "additional" has a different meaning than "supplemental" and the strained interpretation given to § 1415(e)(2) by the First and Ninth Circuits is inconsistent with the plain language of the statute. *Metropolitan Gov't of Nashville v. Cook*, 915 F.2d 232, 234 (6th Cir. 1990). Second, the Tenth Circuit, in adopting a view similar to that articu-

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experience in administering the IDEA, there is no doubt that Dr. Bruns' testimony would meet the standards of *Kumho Tire Co v. Carmichael*, 526 U.S. 137, 142, 145 (1999).

[4] Respondent now argues the smoking gun memoranda were "*apparently* available" to the Petitioners. Brief in Opposition at 21 (emphasis added). This assertion is incorrect.

The fact that Mr. Gosling sought to explain the very existence of these documents during his deposition is entitled to little evidentiary weight because this *fact* witnesss was compensated in connection with *both* his preparation time and his deposition testimony. JA 564-566.

lated by the Sixth Circuit, has concluded there is a division between the circuits on this issue. *Murray v. Montrose County School Dist*, 51 F.3d 921, 930-931, & n. 15 (10th Cir. 1995). Thus, there is a clear split in the Circuits, notwithstanding the Eleventh Circuit's claim that additional and supplemental really mean the same thing.

III. PETITIONERS ARE ENTITLED TO A TRIAL BY JURY

Contrary to Respondent's assertions, Petitioners did not abandon the §504 and § 1983 claims below. They were raised and considered by both the Hearing Officer and the Reviewing Officer. JA 1000, 1204. The Petitioners continued to raise these claims during the judicial proceedings before the District Court. JA 16, 571-578. Moreover, even if Petitioners had not exhausted these claims, there is a split in the Circuits as to whether administrative exhaustion is required. *See* Petition for Writ of Certiorari at 29.

Petitioners are entitled to a jury trial on their § 504 and 1983 claims and these issues should be tried before and decided by a jury, *prior* to issues to be decided by the Court, so that their Seventh Amendment rights are not foreclosed on common factual issues. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). If the jury finds that the School Board's policy is contrary to § 504 and § 1983 and that Petitioners' rights under these laws have been violated, then these findings are binding on the court's analysis of the IDEA claims, which should be decided only after the jury renders a verdict on Petitioners' damages claim. If Petitioners' § 504 and § 1983 claims were permitted to be tried by a jury first, and they prevailed, the court would not be estopped from giving the appropriate "due weight" to the administrative decisions in deciding the IDEA claims.

The School Board's argument misses the point of Petitioners' claim to a jury trial. If Petitioners have a Seventh Amendment right to a jury trial on their § 504 and § 1983 claims, then

the whole question of Congressional intent is irrelevant: Congress could not deny Petitioners their constitutional right to a jury trial, even if Congress had intended to do so.

CONCLUSION

The decisions of the courts below effectively deny parents any meaningful review of the decisions made by their school boards to deny handicapped children the statutory right to attend school and be mainstreamed with their nondisabled peers. By placing the burden of proof on the parents at the administrative level, by requiring that the administrative findings "are entitled to be considered *prima facie* correct," and by excluding additional evidence, the Fourth Circuit has, in essence, required that the District Court affirm the administrative decisions if such decisions are supported by substantial evidence. This interpretation of the IDEA's review provision was soundly rejected by this Court's opinion in *Rowley*, *supra*, which rejected the substantial evidence standard. *Id.*, 458 U.S. at 205.

We respectfully request the Court to grant the Petition to decide these issues of national importance, to resolve a split among the Circuits and the New Jersey Supreme Court, and to correct the legal errors of the Fourth Circuit. Meaningful access to the courts for parents bringing claims under the IDEA, § 504, and § 1983 should not be a function of geography.

Respectfully submitted,

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